

RUBAIDAH DIRIN*a*

v.

AHMAD ARIFFIN

COURT OF APPEAL, KUALA LUMPUR

GOPAL SRI RAM JCA

b

N.H. CHAN JCA

MAHADEV SHANKAR JCA

[CIVIL APPEAL NO: B-04-111-95]

3 DECEMBER 1996

TORT: *Fatal accident - Dependency claim - Deceased contributorily negligent - Whether dependents entitled to recover total damages from defendant regardless of the extent of the deceased's negligence - Consideration of Veronica Joseph (f), An Infant & Anor. v. Tu Kon Lin & Anor. [1987] 1 CLJ 81 - Sections 7, 8 & 12 Civil Law Act 1956.*

*c**d*

This was a claim for damages under s. 7 of the Civil Law Act 1956 (the Act) filed by the widow (the plaintiff) of a motorcyclist who died in a head-on collision with a motorcar. At the conclusion of the trial, it was inferred from the evidence that the collision had taken place when both vehicles were travelling at a fast speed with the motorcyclist at least 80cm into the defendant's side of the road when he collided head-on into the front off-side of the defendant's car. Counsel for the dependants submitted that the accident was caused by the substantial negligence of the defendant and alternatively, he prayed for 100% liability against the defendant in any event based on *Veronica Joseph (f), An Infant & Anor. v. Tu Kon Lin & Anor. [1987] 1 CLJ 81*. Defendant's Counsel submitted that the deceased was the sole or substantial author of his own misfortune and asked for apportionment of liability based on *Lim Chai Onn & Anor. v. Normah bt. Ismail [1994] 2 CLJ 783*.

*e**f*

The learned Sessions Judge found the defendant 100% liable for the accident and awarded the plaintiffs RM75,000 damages and a further RM10,000 for bereavement and RM1,500 for funeral expenses. But upon the defendant's appeal, the learned Sessions Judge produced a written judgment stating that in the absence of clear evidence as to how the accident happened, he should have apportioned liability at 50:50. The learned High Court Judge reviewed the evidence and apportioned liability at 70:30 against the defendant and reduced the damages proportionately based on a loss of dependency of RM310 per month. The plaintiff appealed.

*g**h*

The issue was whether in a dependency claim the plaintiffs are entitled to effect total recovery of their damages from a defendant tortfeasor regardless of the extent to which the deceased was found contributorily negligent for his death.

i

a **Held:**

Per Mahadev Shankar JCA (delivering the judgment of the Court):

- b* [1] The initial finding of the Sessions Judge was perverse. His subsequent revision to 50:50 is commendable to the extent that he admitted his mistake but in law it is worthless because he was *functus officio* by that stage. On any view of the matter the deceased was the substantial author of his own misfortune but there was some material to support the Judge's finding of 70:30 liability for the accident and his assessment of the value of the loss of support at RM310 per month.
- c* [2] Since only one action can be brought for a death by s. 7(5) of our Act the reduction to a proportionate extent required by s. 12(4) must take place in that action. Such reduction is to the **damages recoverable by the dependents** in that action. The statute does not envisage a situation where the dependents may recover unreduced the total amount of their damages from one or more defendants and leave them to claim contribution in some other action.
- d*
- e* [3a] The trial Judge in *Veronica* and the Judge in *Balachandran a/l Samy* both erred in failing to appreciate the true significance of the word "if" in s. 12(4). Since by s. 8(1) of our Act all causes of action vested in a person or subsisting against him survive for the benefit of the estate, or against it as the case may be, in an action brought against him by the deceased executor or administrator, a defendant tortfeasor can claim, as a matter of right, to have his damages reduced to the extent of the deceased's contributory negligence. The Court must do so in that action.
- f*
- g* [3b] The s. 8 action referred to in s. 12(4) is hypothetical. The reduction for proven contributory negligence in a s. 7 action is automatic. The suggestion in *Veronica* that a defendant tortfeasor must look to the deceased's estate for contribution for the failure of the deceased **to take care of himself** is totally misconceived. Contribution is something tortfeasors claim from each other. The contributory negligence of the deceased for his own death is a defence which is set up against the
- h*

Per curiam:

- i* The duty of the Court is to apply the law as it finds it and not to create judicial foundations for a welfare state. The Court does not think our legislation

was ever intended to produce a windfall for dependents of deceased persons who were substantially the authors of their own misfortune. a

Per curiam:

It is worthwhile emphasising that all persons concerned in the judicial process of enforcing a statutory remedy should have an overview of the statute as a whole before picking out one or two sections for application. In this way inconsistencies and distortions are avoided in the remedy which was intended to be provided. b

[Appeal dismissed. Each party to bear its own costs throughout the litigation] c

[Bahasa Malaysia Translation of Headnotes]

TORT: *Kemalangan maut - Tuntutan tanggungan - Simati cuai secara sertaan - Samada tanggungan berhak untuk mendapatkan semula keseluruhan gantirugi daripada defendan tanpa menghiraukan had kecuai simati - Pertimbangan Veronica Joseph (f), An Infant & Anor. v. Tu Kon Lin & Anor. [1987] 1 CLJ 81 - Seksyen-seksyen 7, 8 & 12 Akta Undang-Undang Sivil 1956.* d

Ini adalah merupakan tuntutan untuk gantirugi di bawah s. 7 Akta Undang-Undang Sivil 1956 (Akta tersebut) yang difailkan oleh balu (plaintif) seorang penunggang motosikal yang telah meninggal dunia dalam satu pelanggaran depan sama depan dengan sebuah kereta. Pada penghujung perbicaraan, telah disimpulkan daripada keterangan bahawa pelanggaran itu telah berlaku ketika kedua-dua kenderaan bergerak dengan kelajuan yang terlalu deras, penunggang motosikal menunggang sekurang-kurangnya 80sm ke dalam bahagian jalan defendan ketika beliau melanggar depan sama depan di bahagian depan kereta defendan. Peguam bagi pihak tanggungan-tanggungan telah berhujah bahawa kemalangan tersebut telah disebabkan oleh kecuai yang substansial defendan dan secara alternatifnya, beliau telah memohon untuk mendapatkan 100% tanggungan terhadap defendan dalam apa keadaan pun berdasarkan *Veronica Joseph (f), An Infant & Anor v. Tu Kon Lin & Anor. [1987] 1 CLJ 81*. Peguamcara defendan berhujah bahawa simati adalah penyebab tunggal atau yang substansial bagi kemalangannya sendiri dan telah meminta pengumpulan tanggungan berdasarkan *Lim Chai Onn & Anor. v. Normah bt. Ismail [1994] 2 CLJ 783*. e
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g
h

Hakim Mahkamah Sesyen yang bijaksana mendapati defendan bertanggung 100% atas kemalangan tersebut dan telah mengawardkan plaintif RM75,000 bagi gantirugi dan RM1,500 untuk perbelanjaan pengkebumian. Tetapi atas rayuan defendan, Hakim Mahkamah Sesyen yang bijaksana telah i

- a* mengemukakan penghujahan bertulis yang menyatakan bahawa dalam ketiadaan keterangan yang jelas mengenai bagaimana kemalangan itu telah berlaku, beliau sepatutnya telah mengumpukkan tanggungan pada kadar 50:50. Hakim Mahkamah Tinggi yang bijaksana telah mengkaji semula keterangan tersebut dan mengumpukkannya pada 70:30 terhadap defendan dan mengurangkan
- b* gantirugi menurut kadarnya berdasarkan kerugian tanggungan sebanyak RM310 sebulan. Plaintiff telah merayu.

Isunya adalah samada dalam sesuatu tuntutan tanggungan plaintiff-plaintiff adalah berhak untuk menguatkuasakan pemerolehan kembali akan gantirugi mereka daripada tortfeasor defendan tanpa menghiraukan had setakat mana simati

c didapati cuai secara sertaan atas kematian beliau.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

- d* [1] Keputusan awal Hakim Mahkamah Sesyen adalah salah. Semakan beliau yang berikutan itu kepada 50:50 adalah patut dipuji bahawa beliau telah mengakui kesalahannya tetapi menurut undang-undang ianya tidak bernilai kerana ianya *functus officio* ketika itu. Berhubung dengan apa-apa
- e* pendapat mengenai perkara itu simati merupakan penyebab substansial akan nasib malangnya sendiri tetapi terdapat beberapa perkara yang menyokong keputusan Hakim akan tanggungan 70:30 bagi kemalangan tersebut dan penilaiannya bagi nilai kehilangan penyara sebanyak RM310 sebulan.
- f* [2] Oleh kerana hanya satu tindakan sahaja yang boleh dimulakan bagi kematian menurut s. 7(5) Akta pengurangan menurut kadar yang dikehendaki oleh s. 12(4) haruslah berlaku dalam tindakan itu. Pengurangan yang sedemikian adalah pada gantirugi yang boleh
- g* didapatkan semula oleh tanggungan dalam tindakan itu. Statut itu tidak menjangkakan situasi di mana tanggungan boleh mendapatkan semula jumlah gantiurgi mereka yang tidak dikurangkan daripada seorang atau lebih defendan dan membenarkan mereka menuntut gantirugi dalam tindakan yang lain.
- h* [3a] Hakim perbicaraan dalam *Veronica* dan Hakim dalam *Balachandran a/l Samy* keduanya-duanya telah salah pertimbangan dalam kegagalan untuk menghargai maksud sebenar perkataan "if" dalam s. 12(4). Oleh kerana menurut s. 8(1) Akta kesemua kausa-kausa tindakan yang diletakhak pada seseorang atau berkuatkuasa terhadapnya akan terus
- i* hidup demi kepentingan hartapustaka tersebut, atau bertentangan

dengannya seperti mana keadaannya, dalam satu tindakan yang dimulakan terhadapnya oleh pentadbir atau wasi simati, tortfeasor defendan boleh menuntut, sebagai hak, untuk mengurangkan gantiruginya kepada had kecuaiian sertaan simati. Mahkamah mestilah melakukan sedemikian dalam tindakan itu. Tujuan s. 12(4) adalah untuk memasukkan hak ini ke dalam tuntutan yang dimulakan untuk kepentingan tanggungan di bawah s. 7 – oleh wasi, pada mulanya, atau tanggungan-tanggungan tersebut dengan sendirinya atas nama-nama mereka sendiri, enam bulan kemudian.

[3b] Tindakan s. 8 yang dirujuk dalam s. 12(4) adalah merupakan andaian. Pengurangan untuk kecuaiian sertaan yang terbukti dalam sesuatu tindakan s. 7 adalah secara automatik. Saranan dalam *Veronica* bahawa tortfeasor defendan mesti berpaling kepada harta pusaka simati untuk mendapatkan sumbangan atas kegagalan simati untuk menjaga dirinya sendiri adalah sesungguhnya disalah-tafsirkan. Sumbangan adalah sesuatu yang dituntut oleh tortfeasor antara satu dengan yang lain. Kecuaiian sertaan simati atas kematiannya sendiri adalah suatu pembelaan yang telah dibuat terhadap tanggungan plaintif.

Per Curiam:

Kewajipan Mahkamah ialah untuk melaksanakan undang-undang sepertimana yang didapatinya dan bukannya untuk mewujudkan asas kehakiman bagi sesuatu keadaan kebajikan. Mahkamah tidak memikirkan bahawa perundangan kita pernah diniatkan untuk mengeluarkan durian runtuh untuk tanggungan-tanggungan orang-orang yang telah mati yang secara substansial merupakan penyebab nasib malang mereka sendiri.

Per curiam:

Ianya berpatutan untuk menekankan bahawa kesemua orang yang berkaitan dengan proses kehakiman bagi menguatkuasakan sesuatu remedi berkanun seharusnya mempunyai gambaran keseluruhan statut tersebut secara menyeluruh sebelum memilih satu atau dua bahagian untuk dipakai. Dengan cara ini keadaan tak konsisten dan putarbelit dapat dijaui dalam remedi yang hendak diberikan.

[Rayuan ditolak. Masing-masing pihak menanggung kosnya sendiri sepanjang litigasi.]

Cases referred to:

Veronica Joseph (f), An infant & Anor. v. Tu Kon Lin & Anor. [1987] 1 CLJ 81 (ovrd)

Lim Chai Onn & Anor. v. Normah bt Ismail [1994] 2 CLJ 783 (aff)

Maimunah bte Hassan v. Marimuthu (Sebagai Wakil Harta Pusaka Rozita bte Khamis) & Satu Lagi v. Marimuthu s/o Samanathan & Satu Lagi [1993] 1 CLJ 119

- a* *Balachandran a/l Samy & Anor. v. Chew Man Chan @ Ah Yeow & Anor.* [1996] 1 CLJ 169
Samsuri bin Saad & Anor. v. Chew Kit Toh t/a Kit Thong Woh Hup & Another Appeal [1996] 2 CLJ 109
Senior v. Ward [1859] 1 E. & E. 385 (*cit*)
Mallett v. Dunn [1949] 2 KB 1980 (*refd*)
- b* *Maxfield v. Llewellyn & Ors.* [1961] 1 WLR 1119 (*dist*)
Mulholland v. McCrea [1961] NI 135 (*refd*)
Stapley v. Gypsum Mines Ltd. [1953] AC 633 (*refd*)
Tara Singh v. Public Prosecutor [1954] 20 MLJ 123 (*refd*)

Legislation referred to:

- c* Administration of Justice Act [UK] 1982
 Civil Law Act 1956, ss. 7, 8, 12(1), (2), (4), 7(5), 8(1)
 Fatal Accidents Act [UK] 1846
 Law Reform (Contributory Negligence) Act [UK] 1945, s. 12
 Law Reform (Married Women and Tortfeasors) [UK] Act 1935
- d* Law Reform (Miscellaneous Provisions) Act [UK] 1934, ss. 7, 8
 Law Reform (Miscellaneous Provisions) Act [UK] 1970

Other sources referred to:

- McGregor on Damages*, 13th Edn., p. 791
Halsbury's Statutes, Vol. 31, 4th Edn., p. 204
Clerk & Lindsell On Torts, 12th Edn., [1961], paras. 36(1), 395, 683, p. 219
- e* *Salmond on the Laws of Torts*, 17th Edn., [1977], p. 584
Winfield and Jolowicz on Torts, 13th Edn., [1989], pp. 168, 497, 594, 595, 650
The English and Empire Digest, para. 1188, pp. 291, 304, 305
- For the plaintiff - Teh Poh Lian; M/s. Teh & Assoc.*
- f* *For the respondent - S. Kanagasabapathi; M/s. R.K. Nathan & Co.*

JUDGMENT

Mahadev Shankar JCA:

- g* The crucial issue in this appeal is whether in a dependency claim the plaintiffs are entitled to effect total recovery of their damages from a defendant tortfeasor regardless of the extent to which the deceased was found contributorily negligent for his death.

- h* A motorcyclist Basia bin Bahari (the deceased) died in a head-on collision with a motorcar. Rubaidah bte Dirin (the widow) filed an action for damages. The endorsement on the summons reads:

- i* The plaintiff brings this action under s. 7 of the Civil Law Act 1956, for her own benefit and also for the benefit of her four children as dependents of Basia bin Bahari, deceased caused by the negligence of the defendant in the driving, use or management of motor vehicle No. WP 2349 on 2 November 1985 at/or near

the 16th milestone, Kuala Lumpur/Kuala Selangor and for interest and costs of this action. **a**

The statement of claim set out the usual details of a running down action and “Particulars pursuant to s. 7 of the Civil Law Act 1956” (‘the Act’).

The defence was a denial of negligence and coupled with a positive averment that the accident was caused solely or contributed to substantially by the negligence of the deceased in overtaking an unidentified motorcar and colliding with the defendant who was then on his correct side of the road. **b**

At the trial in December 1992 the widow’s solicitors called the Investigating Officer who produced the sketch plan and key, and said the car was severely damaged on the front off-side – headlamp smashed, mudguard dented, tyre punctured, driver’s door so dented it could not be opened, wind-screen smashed etc. The damage to the deceased motorcycle was also very extensive. There were no glass fragments found on the road, because all the fragments were inside the car. No eye witness were located. The second and third witnesses gave evidence of the deceased’s employment and earnings. The fourth witness was the widow who gave evidence of dependency. The defendant then gave evidence. He produced his police report made on 19 November 1985 i.e. 17 days after the accident. In it he claimed the deceased had emerged at great speed from behind the on-coming vehicle. The defendant did not brake but swerved left. The collision nevertheless took place. **c**
d
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There were no scratch marks on the road. There was a blood spot 80 cm or about 2 feet 8 inches inside the defendant’s part of the road. The severed right hand of the deceased was found on the defendant’s left verge about 20 meters behind the defendant’s car. The deceased’s body was on his verge about 33 meters beyond the blood spot and his motorcycle even further away. The post-mortem report showed fatal fractures to the deceased’s skull. The only possible inference from all this was that the collision had taken place when both vehicles were going fast with the motorcyclist at least 80 cm into the defendant’s side of the road when he collided head-on into the front off-side of the defendant’s car, broke his head and died very shortly thereafter. **f**
g

The widow’s Counsel submitted that the accident occurred by reason of the substantial negligence of the defendant. In the alternative he relied on *Veronica Joseph (f), An Infant & Anor. v. Tu Kon Lin & Anor.* [1987] 1 CLJ 81 (*Veronica*) and prayed for 100% liability against the defendant in any event. The defendant’s Counsel submitted that the deceased was the sole or substantial author of his own misfortune, and asked for apportionment based on *Lim Chai Onn & Anor. v. Normah bt. Ismail* [1994] 2 AMR 33, 1679 (‘*Lim Chai Oon*’). **h**
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- a* In a reserved judgment the Sessions Judge said the defendant was 100% liable for the accident. He gave no reasons, and awarded RM75,000 damages. Subsequently at the request of the plaintiff he awarded a further RM10,000 for bereavement and RM1,500 for expenses incurred for burial expenses.
- b* The defendant appealed. The Sessions Judge gave an undated written judgment in which he said that in the absence of clear evidence as to how the accident happened he should have apportioned liability 50:50 and that his mistake in finding the defendant 100% liable should be corrected by the appellate Court if it thought fit.
- c* The appeal came before the High Court Judge at Shah Alam. The Notes of Evidence recites the names of Counsel and merely states:
- Hakim bicara betul
- This is of no assistance to us.
- d* The Judge then gave his decision as follows:
- Rayuan dibenarkan dengan kos.
- Liabiliti – Plaintiff 70% : 30% defendan
- e* Kuantum – RM310 x 8½ x 12 months.
- The widow appealed.
- f* In his grounds of judgment the Judge said he had reviewed the evidence and found the deceased 70% liable and the defendant 30% liable for the accident, and assessed damages for dependency on the basis of a monthly loss of dependency at RM310 per month (i.e. RM310 x 12 x 8½) plus bereavement of RM10,000 and burial expenses of RM1,500.
- He did not comment on *Veronica's* case aforesaid or *Lim Chai Oon & Anor. v. Normah bt. Ismail (Widow) & Anor.* [1994] 2 AMR 33, 1679. The order of the High Court however has reduced the damages to a proportionate extent. So we may infer that he preferred to follow *Lim Chai Oon.*
- g*
- Counsel for the widow submits that regardless of the deceased's share of blame we should impose 100% liability on the defendant.
- h* The initial finding of the Sessions Judge was perverse. His subsequent revision to 50:50 is commendable to the extent that he admitted his mistake but in law it is worthless because he was *functus officio* by that stage. On any view of the matter the deceased was the substantial author of his own misfortune but there was some material to support the Judge's finding of 70:30 liability
- i*

for the accident and his assessment of the value of the loss of support at RM310 per month. **a**

Veronica was followed or preferred to *Lim Chai Oon* in the following cases:

- (1) *Maimunah bte Hassan v. Marimuthu (Sebagai Wakil Harta Pusaka Rozila bte Khamis) & Satu Lagi v. Marimuthu s/o Samanathan & Satu Lagi* [1993] 1 CLJ 119. **b**
- (2) *Balachandran a/l Samy & Anor. v. Chew Man Chan @ Ah Yeow & Anor.* [1996] 1 CLJ 169.
- (3) *Samsuri bin Saad & Anor. v. Chew Kit Toh t/a Kit Thong Woh Hup & Another Appeal* [1996] 2 CLJ 109 **c**

Before we submit these decisions to an in-depth analysis we think it worthwhile emphasising that all persons concerned in the judicial process of enforcing a statutory remedy should have an overview of the statute as a whole before picking out one or two sections for application. In this way we avoid inconsistency and distortions in the remedy which was intended to be provided. We start with ss. 7 and 8 of the Civil Law Act 1956 (our Act). The relevant portions are reproduced hereunder with emphasis added on those words we consider especially relevant to the present exercise: **d**

PART III **e**

Fatal Accidents and **Survival** of Causes of Action

7. **Compensation to the family of a person for loss occasioned by his death.**

- (1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would **if death had not ensued**, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code. **f**
- (2) Every such action shall **for the benefit of** the wife, husband, parent, and child, if any, of the person whose death has been so caused and **shall be brought by and in the name of the executor** of the person deceased. **g**
- (5) Not more than **one action** shall be brought for an in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of the person deceased. **h**
- (6) In any such action the executor of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by **i**

a the wrongful act, neglect or default, which sum when recovered shall be deemed part of the assets of the estate of the deceased.

b (8) **If there is no executor** of the person or there being an executor no action as in this mentioned has, within six calendar months after the death of the person deceased, been brought by the executor, the action may be brought **by all or any of the persons**, if more than one, for whose benefit the action would have been brought if it had been brought by the executor, and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it was brought by the executor.

c Section 8:

8. **Effect of death on certain causes of action.**

d (1) Subject to this section, **on death of any person** all causes of action subsisting against or **vested in him** shall survive against, or, as the case may be, for the benefit of, his estate:

e (5) The rights conferred by this section **for the benefit of the estate** of deceased persons shall be in addition to and not in derogation of any rights conferred **on the dependents** of deceased persons by s. 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relations to causes of action under the said section as it applies in relation to other causes not expressly excepted by the operation of sub-s. (1).

The provisions relating to contributory negligence are contained in Part V and the relevant sections are 12(1), (2) and (4). They read as follows:

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PART V

Contributory Negligence and Common Employment

12. **Apportionment of liability in case of contributory negligence.**

g (1) Where any person **suffers damage** as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but **the damages recoverable in respect thereof** shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

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(2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the Court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

i

- (4) Where any person **dies** as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly **if** an action were brought for the benefit of the estate under s. 8, the damages recoverable would be reduced under sub-s. (1), **any damages recoverable in any action** brought for the benefit of the dependents of that person **under s. 7** or for the benefit of the husband of that person under proviso (iii) of sub-s. (3) of s. 7 or of the spouse or parents under sub-s. (3B) of s. 7 **shall be reduced to a proportionate extent.**

a

b

At common law no action was maintainable for causing death. The first statutory exception to this rule was made by the Fatal Accidents Act 1846. It was stimulated by the spate of railway accidents after the advent of rail transport. (See *McGregor on Damages* 13th Edn., p. 791 *et seq*). This Act has been subsequently amended a number of times in the United Kingdom right up to a consolidating statute in 1976.

c

It must be emphasised that the basis of the dependency action in s. 7 of our Act is indisputably derivative. It only lies, if the defendant's default was such as would have entitled the deceased to maintain an action **if he had not been killed**. Consequently all the defences which would have been open to the defendant had he been sued by the deceased when the deceased was alive, would equally avail the defendant notwithstanding the death of the deceased. If, prior to his death, the deceased's right to sue had been extinguished, for any reason, the dependents could not bring any claim at all. Reference may be made to Vol. 31 *Halsbury's Statutes* (4th Edn.) at p. 204 which lists various defences available against the dependents under the Fatal Accidents Act which were available against the deceased, when he had been alive. So until the position was changed by the 1945 United Kingdom Act, the contributory negligence of the deceased was also a complete defence to a dependency claim under Fatal Accidents Act. (See *Senior v. Ward* [1859] 1 E. & E. 385). Until we imported the equivalent of the United Kingdom 1945 Act into our laws, that was the position in Malaysia also.

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It should also be noted that it was the executor of the deceased estate who had to bring the claim under s. 7 for the benefit of the dependents. There was only one cause of action. The dependents could only bring the action in their own names after six months if by that time an executor had not done so.

g

A spate of road accidents led to the passing of the United Kingdom Law Reform (Miscellaneous Provisions) Act 1934 which provided for the survival of all causes of action. Section 8 of our Act has its genesis in this English statute. Before it, causes of action vested in a deceased or subsisting against him abated on his death. After it came into force contributory negligence was a complete defence to this action also.

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- a* It is to overcome this that the United Kingdom **Law Reform (Contributory Negligence) Act 1945** was passed. Contributory negligence ceased to be a defence but could be pleaded in reduction. The provisions of this Act for the purposes of the present exercise may be considered to be *in pari materia* with s. 12 of our Act.
- b* Thus ss. 7, 8 and 12 of our Act is an amalgam of three English statutes. The equivalent of Part IV of our Act which deals with actions against and proceedings for contribution between joint and several tortfeasors is a fourth and distinct English statute, i.e. the **Law Reform (Married Women and Tortfeasors) Act 1935**.
- c* To recapitulate, until the **Law Reform (Contributory Negligence) Act 1945** was passed, a successful plea of contributory negligence on the part of a deceased was enough to defeat a claim by his dependents or by his estate. But where a person was killed by the negligence of one or more tortfeasors and the deceased could in no way be identified with the cause of his death,
- d* his dependents or estate could of course elect which tortfeasor to sue, and upon recovering judgment against any or all of them again elect against whom they wished to effect full recovery and leave that tortfeasor to sue for contribution from the others who had been held liable or if sued could have been held liable.
- e*
- f* We should have thought that the words of s. 12(4) of our Act are clear enough to indicate that if the deceased was contributorily negligent the dependent plaintiffs in a s. 7 action can only recover from any or all the tortfeasors liable such proportion of their damages as can be attributed to the defendants' share of blame. Since only one action can be brought for a death by s. 7(5) of our Act the reduction to a proportionate extent required by s. 12(4) must take place in that action. Such reduction is to the **damages recoverable by the dependents** in that action. The statute does not envisage a situation where the dependents may recover unreduced the total amount of their damages from one or more defendants and leave them to claim contribution in some other action.
- g*
- So *Clerk & Lindsell On Torts* (12th Edn.) [1961] says in para. 395 at p. 219:
- h* If at the moment of death the right of action of the deceased is barred, e.g., by a contract excluding himself from the right to claim damages, by accord and satisfaction, or by the operation of a statute of limitation, the dependents' right is also barred; if it would have been affected by his own contributory negligence, the damages awarded to his dependents will be proportionately reduced.⁸
- i*

Salmond on the Laws of Torts (17th Edn.) [1977] says at p. 584:

If the deceased has been guilty of contributory negligence, the Fatal Accidents Act 1976, s. 5, provides that the damages awarded under that Act may be reduced proportionately, and the same rules applies by analogy if a plaintiff dependent has been guilty of contributory negligence.

And *Winfield and Jolowicz on Torts*, 13th Edn. [1989] says at p. 650:

But so long as the deceased's claim has not become statute barred when he dies, then the dependents have the full three years from the death (or, in certain cases, the time when they know they have a cause of action) in which to sue, for their claim, which arises, on the death, has no connection with the deceased's. It is thus somewhat illogical, though doubtless good practical sense, that, since the Law Reform (Contributory Negligence) Act 1945, if the deceased was himself partly to blame for the accident which caused his death, the damages recoverable by his dependents are reduced in proportion to his share of responsibility for the accident. Before the Act of 1945, of course, the dependents could have recovered nothing for the deceased could not himself have sued.

This is an appropriate time for us to consider the English cases to which the learned trial Judge in *Veronica* referred in support of his conclusion because we think, with respect, that had he been properly briefed he would not have decided as he did.

Mallett v. Dunn [1949] 2 KB 1980 was emphatically not a dependency claim or even a claim for the benefit of the deceased wife's estate. It was a claim by a husband for the loss of consortium and servitium arising from injuries to his wife from which she died. See *Clerk and Lindsell (ibid)* says at para. 683 and 36(1) *The English and Empire Digest* para. 1188 at p. 291 which reads:

A husband who sues for damages caused to him by reason of injuries negligently inflicted on his wife sues in his own right, and the fact that the wife was guilty of contributory negligence neither defeats his claim at common law nor causes any diminution of his damages under Law Reform (Contributory Negligence) Act 1945.

If only as a matter of academic interest it may be observed that *Mallett v. Dunn (ibid)* has become legal history in the United Kingdom with the abolition of the cause of action for loss of services or consortium. (See **Law Reform (Miscellaneous Provisions) Act 1970** and **Administration of Justice Act 1982** – both referred to in *Winfield and Jolowicz (ibid)* at p. 497).

Maxfield v. Llewellyn & Ors. [1961] 1 WLR 1119 is distinguished in that even though the action was one under the *Fatal Accidents Act* and the **Law Reform (Miscellaneous Provisions) Act 1934** (i.e. our s. 7 and 8) the

- a* plaintiff was the widow of the deceased **pillion rider** in a 3-vehicle collision, i.e. the post-office van, the cattle truck and the motorcycle. The widow sued the drivers of the cattle truck and the post-office van. She did not sue the deceased motorcyclist's estate. Nor did the two defendants. The trial Judge found the cattle truck driver 100% liable. On appeal he asked the Court to
- b* apportion some blame on the van driver **and** to the deceased motorcyclist. The van driver contended that the trial Judge's finding should not be disturbed because there could be no apportionment unless all three parties were before the Court. The appellate Court refused to allocate any liability against the motorcyclist's estate *in absentia* but apportioned liability between the cattle
- c* truck driver and van driver two-thirds and one-third. This decision is certainly not authority for the proposition that the dependents of a deceased who is contributorily negligent can recover their damages in full.

- The trial Judge in *Veronica*, and the Judge in *Balachandran a/l Samy* both erred in failing to appreciate the true significance of the word "if" in s. 12(4).
- d* Since by s. 8(1) of our Act all causes of action vested in a person or subsisting against him survive for the benefit of the estate, or against it as the case may be, in an action brought against him by the deceased executor or administrator, a defendant tortfeasor can claim, as a matter of right, to have his damages reduced to the extent of the deceased's contributory negligence.
- e* The Court must do so in that action. The object of s. 12(4) was to import this right into claims brought for the benefit of dependents under s. 7 – by the executor, in the first place, or the dependents themselves in their own names six months later. The s. 8 action referred to in s. 12(4) is hypothetical. The reduction for proven contributory negligence in a s. 7 action is automatic.
- f* The suggestion in *Veronica* that a defendant tortfeasor must look to the deceased's estate for contribution for the failure of the deceased **to take care of himself** is totally misconceived. Contribution is something tortfeasors claim from each other. The contributory negligence of the deceased for his own death is a defence which is set up against the dependent plaintiffs.
- g* To make sure that we have made ourselves absolutely clear, we think it desirable to reproduce here the relevant passage in *Winfield and Jolowicz on Torts (ibid)* at p. 168:

- h* Where the acts of two or more defendants combine to injure the plaintiff each is liable to the plaintiff for the whole amount of the loss, though as between the defendants the Court has a statutory power to apportion liability. Both matters are usually settled in the same proceedings, but there are two stages. First, the Court must determine liability and decide what deduction if any is to be made for the plaintiff's contributory negligence. This is done by comparing the plaintiff's conduct on the one hand with the totality of the tortious conduct of
- i* the other: the question at this stage is not, "what is the relative share of

responsibility of each and every part?" but, "how far is the plaintiff the author of his own loss?". The respective shares of the resulting liability are then determined in the contribution proceedings, which are not concern of the plaintiffs. Hence if, at the first stage, the Court concludes that the plaintiff is 50% responsible there is judgment against both defendants for 50% of the damage. If the defendants' responsibility *inter se* is equal then, assuming both to be solvent, each one will finally bear 25% of the loss. If, however, the Court concludes that the plaintiff is only one-third to blame, then the correct judgment is for two-thirds of the damage against both defendants, even though the plaintiff is as much at fault as either defendant.

There is a clear distinction between the question of which the defendant should be forced to pay the plaintiff on the one hand, and how much the defendants can recover from each other. Once again, we return to *Winfield and Jolowicz on Torts*, this time at pp. 594 and 595:

The amount of contribution ordered is to be, "such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage in question." The principles would seem to be the same as for the apportionment of damages between plaintiff and defendant in the other legislation dealing with concurrent fault, the Law Reform (Contributory Negligence) Act 1945, so that the Court must look at both causation and culpability. The question is one of proportion not of principle, involving an individual exercise of discretion by the trial Judge and for that reason appellate Courts will be reluctant to interfere with an apportionment as determined by the Judge. If it considers it appropriate, the Court may exempt the defendant from any liability to make contribution³⁷ or direct that the contribution recoverable shall amount to a complete indemnity. The Court's powers are, however, subject to the overriding principle that one defendant cannot, by way of contribution proceedings, be liable for a greater sum than could be recovered from him by the plaintiff.

The analysis of the other English cases referred to by the trial Judge in *Veronica* was also faulty by reason of a failure to distinguish between a plaintiff with an independent right of action who could in no way be associated with the tortfeasors, and those plaintiffs who could directly or vicariously be identified with the negligence in question. Thus *Mulholland v. McCrea* [1961] NI 135, where a husband's own negligence partly contributed to the death of his wife his dependency claim was reduced in proportion to his share of responsibility. *Stapley v. Gypsum Mines Ltd.* [1953] AC 633 is significant to the extent that passengers and pillion riders may have such a community of interest with the driver in the purpose of the journey or the ownership of the vehicle so as to be identified with or be regarded vicariously liable for his negligence. (See cases in 36(1) *The English and Empire* [1976] pp. 304, 305).

We feel we have said enough to show that *Veronica* is demonstrably incorrect

a and should not be followed. The lawyers who persuaded the trial Judge to arrive at that finding and those who perpetuated it must share in the collective responsibility for the adverse repercussions which have followed. By the same token and for the additional reasons we have spelt out here we say that *Lim Chai Oon* was correctly decided.

b In *Tara Singh v. Public Prosecutor* [1954] 20 MLJ 123 at p. 125 Buhagiar J said this:

c As Kuerji J, points out in *Smith v. Emperor*, the difficulty in dealing with a case of this nature is to keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that an injury has been caused and the responsibility for the same ultimately rests with none else but the accused; this prejudice is bound more or less to reflect on the question of culpability of the accused and give rise to false issues which tend to cloud judicial vision.

d The same sentiments could equally apply in a dependency claim where a family has lost their breadwinner. However the duty of the Court is to apply the law as it finds it and not to create judicial foundations for a welfare state. We do not think our legislation was ever intended to produce a windfall for dependents of deceased persons who were substantially the authors of their own misfortune.

e We therefore dismissed this appeal.

We ordered that each party bear its own costs throughout this litigation, because until *Veronica* was properly overruled neither party had any choice but to act as they did.

f Reported by Cindy Chan

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